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No. 04-1514

In the Supreme Court of the United States

WH-T.V. BROADCASTING CORPORATION,
Petitioner,

v.

ZENITH ELECTRONICS CORPORATION; MOTOROLA, INC.; and GENERAL INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE WRIT

Zenith's arguments in opposition underscore the need for this Court to grant review. Zenith's characterization of the Seventh Circuit's opinion as merely identifying "the availability of recognized methods" simply adopts, without question, the opinion's fundamental assumption: that regression analysis or other econometric tools are, in fact, the type of "recognized methods" mandated by Fed.R.Evi. 702 and 703 to qualify an expert. Zenith does not and cannot deny that no evidence in the record supports the assumption that these methods represent the minimum standard for intellectual rigor in the field of business valuation. Nor does Zenith deny that the Seventh Circuit articulated a novel standard when it imposed the "negative burden" on proponents of expert testimony to explain why particular methods were not used — even when the record is devoid of any suggestion that those methods can or should be used.

WHTV does not suggest, as Zenith claims, that this Court "retreat" from the standards articulated in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 552 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). To the contrary, this case presents a unique opportunity to clarify the proper application of those standards to expert testimony on damages, economics and other social sciences.

Zenith's reference to *El Aguila Food Products, Inc. v. Gruma Corp.*, 2005 WL 1156090, at *2 (5th Cir. May 17, 2005), to contrast WHTV's reliance on *PSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329-30 (5th Cir. 1997), underscores the need for such explanation by this Court. If two district courts in the Fifth Circuit have the discretion to either accept or reject nearly identical expert

testimony, the scope of that discretion, as it is currently understood, is so broad as to defy predictability. As Zenith's example shows, no litigant can confidently secure expert damages testimony and reasonably expect that testimony to be admitted because any such testimony could arbitrarily be excluded by the district court and, under Zenith's formulation of the abuse of discretion standard, that exclusion would be essentially unreviewable.

FACTS

The Statement of the Case supplied by Zenith Electronics Corporation ("Zenith") makes several factual assertions that are both irrelevant and incorrect. Most of Zenith's factual contentions are directed to the issue of causation rather than damages and, therefore, are irrelevant to the novel application of Fed. R. Evid. 702 and 703 to expert damages testimony. Zenith's motion for summary judgment directed to the issue of causation was denied by the district court.

Substantial evidence suggested that the set-top boxes were fundamentally flawed. In a document written while employed by Motorola/GI, one former Zenith engineer explained the fundamental problem with the Z12C model set-top box:

> It is important to understand the current state of the Z12C platform so reasonable expectations can be set. The Z12C software state, is unfortunately, a product of poor software engineering. Consequently, it is a high maintenance code that's riddled with bugs (both documented and not) and kludges. A Kludge is defined as:
>
> > ... an awkward or clumsy (but at least temporarily effective) solution to a

> programming or hardware design or implementation problem. It originates because another, more elegant or appropriate solution is not currently possible ....
>
> The amount of Kludge in the Z12C code is to the point where it's impractical to extend and costly to rectify.

As another former Zenith engineer stated in an informal e-mail exchange: "This is absolutely scary. I can not believe [Zenith engineers] can write such crappy code ... No wonder WHTV wants to sue us. I can't really blame them ... Totally unacceptable code quality." This "totally unacceptable code" caused the set-top boxes to, among other things, re-boot by themselves, lock up when changing channels, fail to respond to the remote control, freeze the video display or suddenly lose video display altogether.

Contrary to Zenith's claim, WHTV reasonably expected to grow its subscriber base by introducing digital, wireless service before or at the same time as DirecTV Latin America. WHTV projected modest growth after digital conversion, increasing its market share from 2% in 1999 to 4.6% by 2002. By August 1999, WHTV had completed installation of the digital transmission equipment and received the first 1,000 STBs. Had the STBs operated "seamlessly" with WHTV's transmission equipment — as Zenith had expressly warranted — WHTV could have launched within days of DirecTV's July 29th entry into Puerto Rico.

Zenith substantively misrepresents Shapiro's opinion, methods, factual foundation and proposed testimony and Zenith's various citations to the Appendix to WHTV's Petition do not support its mischaracterizations. Although Zenith's expert did not agree that WHTV's market

opportunity was permanently lost, no evidence suggests he believed Shapiro's methodology was inconsistent with professional standards or lacked the appropriate level of intellectual rigor. Indeed, Zenith's expert adopted Shapiro's forecast of subscriber growth without reservation into Zenith's own damages model, stating that he "accepts Shapiro's Revised Case subscriber growth ... rate assumptions because these subscriber growth rates are corroborated by management's contemporaneous expectations of the business, prior to realization of any alleged problems with the Zenith STBs."

CONCLUSION

For the reasons stated, certiorari should be granted to review and ultimately reverse the decision below.

Respectfully submitted,

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